

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ALLEN-JERMAINE BROWN,

Defendant-Appellant.

UNPUBLISHED

August 10, 2006

No. 261893

Wayne Circuit Court

LC No. 04-012409-01

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of life imprisonment for the second-degree murder conviction, life imprisonment for the assault with intent to murder conviction and to two to five years' imprisonment for the felon in possession of a firearm conviction. Defendant was sentenced to a consecutive term of two years' imprisonment for the felony-firearm conviction. For the reasons set forth in this opinion we affirm the convictions and sentences of defendant in this matter.

Defendant's convictions arise from the shooting death of Maria Daniels, age 17, at the intersection of Regent and Tacoma in Detroit on October 7, 2004. Defendant lived at 14181 Tacoma. Leading up to the October 7, 2004 shooting, defendant and Frankie Mathis had three separate confrontations. The first occurred on the morning of July 3, 2004, when Mathis was stopped at the intersection of Regent and Tacoma in his burgundy 1988 Monte Carlo. As defendant was crossing the street in front of Mathis's car, defendant raised his hands in the air and asked Mathis if he was in "your m*** f*** way." Mathis ignored defendant and drove away. When Mathis returned home a short while later, defendant was walking down Tacoma and made a "threatening" gesture. Again, Mathis disregarded defendant. The second confrontation occurred later on July 3, 2004, at 10:30 p.m. Mathis and a friend were driving past defendant's house in the Monte Carlo when a car in front of them "pulled over" causing Mathis to stop in front of defendant's house. Mathis turned and saw defendant standing on his front porch, pointing and firing a handgun at Mathis's car. Mathis removed a "32" caliber handgun from inside the car and fired two shots at defendant; however, no one was injured in the exchange. Defendant's shots struck the Monte Carlo in the right quarter panel and the rear

window. The third encounter between Mathis and defendant occurred approximately two weeks before October 7, 2004, while Mathis was standing outside of his house. Defendant walked past and asked Mathis, “what the f*** are you looking at?” Mathis told defendant to “grow up.”

On October 7, 2004, Maria Daniels was at Mathis’s house for approximately two hours. At 9:00 p.m., Mathis and Daniels left the house in the Monte Carlo. Mathis was taking Daniels home because she had school the next morning. Mathis was driving and Daniels was in the passenger seat. Mathis exited his driveway and drove west on Tacoma. When he came to the intersection of Tacoma and Regent, Mathis saw defendant walking across the street directly in front of the car. Defendant was wearing a “black hoody, black baseball cap and black jeans.” When defendant reached the passenger side of the Monte Carlo near the curb, Mathis saw defendant remove a “45 or 40” caliber “silver” or “chrome” colored handgun from his front pocket. At this point, defendant was standing in front of “some bushes” near the curb in front of a house at 14403 Tacoma. Mathis described defendant’s weapon as a “regular size handgun” similar in kind to the type the “police carry.” Defendant pointed the handgun at the passenger side and opened fire on the Monte Carlo. Mathis testified that he saw defendant’s first few shots hit the hood on the passenger side, the passenger side quarter panel and the front windshield. Mathis told Daniels to “duck down,” and Mathis “sped away,” and headed north on Regent. Defendant continued firing at Mathis’s car from behind, breaking out the back windshield. Mathis estimated that defendant fired a total of “seven or eight” shots. Mathis consistently testified that he did not have a weapon in the Monte Carlo and that he did not shoot at defendant on October 7, 2004. The police did not recover a weapon from inside the Monte Carlo after the shooting.

At approximately 9:05 p.m., Detroit Police Officer Craig Balow and his partner, Jamal Hamood, responded to 14459 Tacoma. When they arrived, Balow noticed Daniels lying motionless in the passenger side of the Monte Carlo and blood on the passenger seat. Balow also observed a bullet hole in (1) the hood on the passenger side, (2) the front and rear windshield and (3) the passenger side door pillar. Daniels was dead at the scene.

Defendant first argues that the prosecutor committed misconduct when she disclosed a report on the first day of trial prepared by Officer David Pauch regarding the existence of a metal jacket fragment removed from Maria Daniels, the victim’s, right temporal area during an autopsy. Defendant contends that this late disclosure denied him his due process rights to a fair trial.

There is no general constitutional right to discovery in a criminal case. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). Thus, a prosecutor’s alleged failure to disclose a lab report is nonconstitutional in nature. *Id.* at 765-766. We review preserved issues of prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

Initially, we note that a *Brady*¹ violation did not occur. Although a defendant does not have a constitutional right to discovery, a criminal defendant does have a due process right to

¹ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

obtain evidence if it is favorable to him and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 664-666; 521 NW2d 557 (1994). “[S]uppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady, supra* at 87. “In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

Here, defendant has failed to show how Pauch’s report regarding the metal jacket fragment was favorable to his case. *Elston, supra* at 766 n 6; *Cox, supra* at 448. Pauch testified that the metal jacket fragment recovered from Daniels’s right temporal area was fired “in and from” the Kel-Tec nine millimeter handgun found near the scene of the shooting. Evidence introduced at trial linked the Kel-Tec nine-millimeter handgun to defendant. Specifically, defendant admitted in his oral statement to Officer Frazer Adams that he used a nine-millimeter handgun when he fired at Daniels and Frankie Mathis while they were inside Mathis’s 1988 Monte Carlo on October 7, 2004. Mathis testified that defendant was shooting at the car with a “silver” or “chrome” handgun. The Kel-Tec was described at trial as a “nickel plated” nine-millimeter handgun. Pauch testified that both nine millimeter live rounds recovered from defendant’s house at 14181 Tacoma could be fired from the Kel-Tec handgun. A microscopic examination of one of the nine-millimeter shell casings recovered at the scene of the shooting indicated that the shell casing matched the Kel-Tec handgun. Thus, viewed in any light, the existence of the metal jacket fragment was not favorable to defendant. Accordingly, defendant has failed to show that a *Brady* violation occurred.

Furthermore, defendant has failed to show that the prosecutor committed misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial because of the actions of the prosecutor. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court considers issues of prosecutorial misconduct “on a case-by-case basis by examining the record.” *Thomas, supra* at 454.

MCR 6.201 governs matters related to criminal discovery. *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). Under MCR 6.201(B), the prosecution must, upon request, provide a criminal defendant with certain information, including any police reports concerning the case. *Id.* MCR 6.201(A)(6) provides for mandatory disclosure upon request of “a description of and an opportunity to inspect any tangible evidence that the party may introduce at trial.” The prosecutor has a continuing duty to promptly notify the other party if at any time the prosecutor discovers additional information. MCR 6.201(H). If the prosecution fails to comply, the trial court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy. MCR 6.201(J). “When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance.” *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

Defendant has failed to show that the prosecutor violated her obligation under MCR 6.201 to provide defendant with Pauch’s report. The crime lab received the metal jacket

fragment on November 18, 2004, and testing on the metal jacket fragment was performed and completed on March 5, 2005. The prosecutor indicated that she received Pauch's report on the first day of defendant's trial, March 7, 2005, and gave the report to trial counsel on the same day. The prosecutor also noted that defense counsel was aware of and received the report from Assistant Wayne County Medical Examiner Fransico Diaz indicating that he removed a "bullet" or a "projectile" from Daniels's right temporal area. The prosecutor complied with her continuing duty to disclose under MCR 6.201(H) by supplying defendant with Pauch's report the same day the prosecutor received the report from the lab. Moreover, defendant was aware of the existence of the "bullet" or "projectile" because Diaz included the information in his report, which was provided to defendant before trial. Thus, we conclude that defendant has failed to show that the prosecutor committed misconduct.

Defendant next argues that the trial court erred when it admitted evidence that two live nine-millimeter rounds were recovered from defendant's residence because it was not relevant and unfairly prejudicial pursuant to MRE 403. We disagree because such evidence was highly relevant to the prosecution's case.

Defendant failed to properly preserve this issue for appeal by objecting to the evidence at the time of its admission. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). We review unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). All relevant evidence is admissible under MRE 402. MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* at 114. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

Here, evidence reveals that a nine-millimeter bullet shot from the Kel-Tec nine-millimeter handgun found at 14167 Tacoma was the cause of Daniels's death. Officer David Haines testified that he recovered two live nine-millimeter rounds from defendant's residence at 14181 Tacoma, three houses east of the scene of the shooting. Sergeant William Anderson testified that although defendant was not present at the time of the search, there were numerous documents found at 14181 Tacoma indicating that defendant resided there. Moreover, during his interview with Adams, defendant stated that he lived on Tacoma. Evidence that two live nine millimeter rounds were found at 14181 Tacoma was relevant because it had a tendency to show that defendant had access to the type of ammunition used in the shooting. This made more probable the prosecutor's theory that defendant was the person who committed the shooting than the theory would have been without the evidence. MRE 401; *Aldrich*, *supra* at 114. Furthermore, defendant has not demonstrated that the probative value of the evidence was substantially outweighed by its prejudicial effect. MRE 403. Testimony regarding the two nine-millimeter live rounds was highly probative in light of the other evidence that a nine-millimeter handgun was used to commit the fatal shooting. Accordingly, defendant has failed to show plain error in the admission of the evidence.

Defendant next argues that the prosecutor committed misconduct by eliciting testimony from Adams that defendant did not make a written statement. Defendant contends that this deprived him of his constitutional right to remain silent.

Defendant failed to preserve this issue by objecting at trial. *Thomas, supra* at 453-454. This Court reviews unpreserved claims of error for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

The police may not interrogate a suspect in custody without first advising him of his Fifth Amendment right against self-incrimination. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Attebury*, 463 Mich 662, 668-669; 624 NW2d 912 (2001). If a defendant is subject to a custodial interrogation, the officer must first advise the defendant of his *Miranda* rights to make a statement admissible. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). A custodial interrogation is questioning initiated by law enforcement officers after the accused has been taken into custody. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A defendant's own statements are not hearsay and are admissible as an admission by a party opponent under MRE 801(d)(2). *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). The fact that a defendant did not make a statement or remained silent cannot be used against him to prove that he was guilty or to impeach him. *People v Bobo*, 390 Mich 355, 358-359; 212 NW2d 190 (1973).

Defendant was arrested and taken into custody at the Ninth Precinct, Adams interviewed defendant on November 15, 2004. Adams introduced himself and advised defendant of his constitutional rights. Defendant read his rights from the Constitutional Rights Certificate (CRC) aloud, initialed and signed it and stated that he only wanted to make an oral statement and would not sign a written statement. Following defendant's waiver of his right to remain silent, Adams proceeded to the shooting. After the one-hour-long conversation, Adams immediately returned to his office and drafted a preliminary complaint record (PCR) summarizing his conversation with defendant. At trial, Adams read the PCR into the record.

Defendant contends that Adams's testimony regarding defendant's refusal to make a formal written statement violated his constitutional right to remain silent. Defendant relies on *People v Westbrook*, 175 Mich App 435; 438 NW2d 300 (1989) and *People v Finley*, 177 Mich App 215; 441 NW2d 774 (1989) in support of his argument. However, both *Westbrook* and *Finley* involved a prosecutor who improperly elicited testimony that each of the defendants remained silent immediately following arrest. Neither defendant in *Westbrook* or *Finley* agreed to waive his right to remain silent or subsequently gave an oral statement to police. *Westbrook, supra* at 438-439; *Finley, supra* at 217.

In the present case, defendant does not challenge on appeal that he validly waived his *Miranda* rights and agreed to voluntarily give an oral statement to Adams. *Attebury, supra* at 668-669. Moreover, defendant does not cite any authority in support of his contention that evidence of a defendant's refusal to give a signed, written statement constitutes a violation of the constitutional right against self-incrimination. Adams could properly relay the substance of defendant's oral statements to the jury as an admission by a party opponent under MRE 801(d)(2). *Kowalak, supra* at 556-557. Defendant's challenge that Adams's summary of defendant's oral statement was inaccurate or unreliable pertains to the weight and credibility of Adams's testimony, not its admissibility. The record reveals that defendant effectively cross-

examined Adams regarding any inconsistencies in his testimony, allowing the jury to determine if the substance of the PCR was accurate. Any reference to defendant's failure to give a written statement was insignificant in light of the fact that defendant waived his right to remain silent and subsequently gave an oral statement to Adams. Thus, we conclude that defendant has failed to establish plain error.

Finally, defendant argues that he is entitled to resentencing where the trial court considered defendant's failure to admit guilt for the charged offenses when it sentenced him to life imprisonment for the second-degree murder conviction.

"A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), quoting MCL 769.34(10). Here, defendant has not preserved the issue because he failed to raise the issue at sentencing, in a proper motion for resentencing or in a proper motion to remand. This Court reviews unpreserved issues for plain error affecting defendant's substantial rights. *Id.* at 312; *Carines*, *supra* at 763-764.

At sentencing, defense counsel indicated that she and defendant had reviewed the Sentence Information Report (SIR) and noted that the SIR was correct. Both parties agreed that defendant's minimum sentence range for the second-degree murder conviction included a statutory maximum of life imprisonment. "[W]hile a sentencing court cannot, in whole or in part, base its sentence on a defendant's refusal to admit guilt, *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977), evidence of a lack of remorse can be considered in determining an individual's potential for rehabilitation." *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). A review of the entire sentencing proceeding reveals that the trial court did not consider defendant's refusal to admit guilt in its calculation of defendant's sentence. Indeed, the trial court noted that the jury found defendant guilty of second-degree murder and that "there are guidelines which govern, to a large extent, my sentencing options in this case." The trial court proceeded to sentence defendant within the statutory range provided by MCL 777.61, which allows for a sentence of life imprisonment for second-degree murder. Thus, we conclude that defendant's sentence of life imprisonment for the second-degree murder conviction was within the appropriate guidelines sentence range. Further, the record does not support defendant's contention that the trial court sentenced defendant based on his refusal to admit guilt.

If a minimum sentence is within the appropriate guidelines sentence range, this Court shall affirm that sentence and shall not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the defendant's sentence. MCL 769.10. Here, defendant's sentence was within the appropriate guidelines range, there was no error in the scoring of the guidelines and there has been no showing that the trial court relied on inaccurate information in determining defendant's sentence. Accordingly, we conclude that defendant has failed to show plain error and that remand for resentencing is not required.

Affirmed.

/s/ Alton T. Davis

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello